I wish to emphasize that section *twenty-three* (5) of the Native Administration Act, read with sub-section (6), makes it clear that no appointment of an executor is necessary if a non-Native is either the creditor or the debtor of a deceased Native and the heir may proceed or be proceeded against, without such formal appointment immediately after the death of the deceased.

According to Native Law and Custom, which is the only law applicable, the property of a deceased Native devolves on the heir immediately on death. Sub-section 7 (*a*) of section *twenty-three* reads clearly to the effect that the estate of any Native who has died leaving no valid will, falls to be administered under the provisions of the Native Administration Act. Sub-section (1) empowers the Governor-General to make regulations not inconsistent with the Act, prescribing the manner in which the estates of deceased Natives shall be administered and distributed. Regulations were issued under Government Notice No. 1664 of 1929, as amended by Government Notice No. 939 of 1947. Section 2 of these regulations prescribes that property not falling within certain categories shall be distributed according to Native Law and Custom. The property concerned in the present case does not fall within the exceptions mentioned in the regulations, and therefore Native Law and Custom applies.

It should be mentioned that Native Law so differs from our Common Law that decisions under Common Law can hardly be applied to a Native estate of the nature now before the Court. Native Law goes so far (except in Natal where a Code applies) as to hold an heir liable for the debts incurred by the deceased, irrespective of whether he inherited anything. He becomes liable *ipso jure* on the death of the deceased and as mentioned by my brother O'Connell, letters of administration are not necessary, and where provision is made for the issue of such letters, their issue is only necessary to empower the heir to carry out acts which are of an executive nature.

Israel (Permanent Member):

I concur.

For Appellant: Adv. D. K. Mann, instructed by Messrs. Drutman & Salakoff, of Pretoria.

For Respondent: Adv. G. G. Hoexter, instructed by Messrs. Saperstein & Kuyper, of Pretoria.

Cases referred to:—

Kourie *v.* Bean, 1949 (2) S.A.L.R. 567.

King *v.* Potgieter, 1950 (3) S.A.L.R. 7.

Lamprecht *v.* Lyttleton Township (Pty.) Ltd. 1948 (4) S.A.L.R. 526.

Statutes, etc., referred to:—

Native Administration Act, No. 38 of 1927, section *twenty-three* (5) and section *twenty-three* (6).

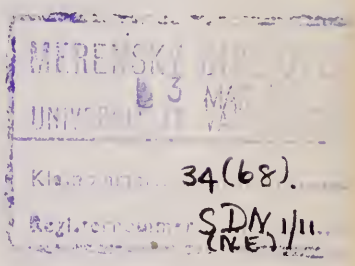
Government Notice No. 1664 of 1929, section 2 (*d*), as amended by Government Notice No. 939 of 1947, and section 4 (1).

Prescription Act, No. 18 of 1943, section 7 (1) (*b*).

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT



(North-Eastern Division)

1951.

VOLUME I

Part II.

The Government Printer, Pretoria.
1951.

G.P.-S.143—1951-2—500.

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CASE No 1 OF 1951.

GIDEON MYEZA (Appellant) *v.* ANNANIAS NGWENYA (Respondent).

(N.A.C. Case No. 97/50.)

VRYHEID: Tuesday, 2nd January, 1951. Before Steenkamp, President, Israel and Thompson, Members of the Court, (North-Eastern Division).

Law of Delicts—Damages for homicide—Deceased must have been under legal duty to render services or maintenance.

Held: That under Common Law, plaintiff must show that he has suffered patrimonial loss through being deprived of benefits, whether in the form of maintenance or services rendered by the deceased *under a legal duty to do so.*

Held: That even under Native Law, in claims arising from homicide, specific damage and calculable pecuniary loss must be proved beyond doubt.

Appeal from the Court of the Native Commissioner, Nongoma.

Israel (Permanent Member), delivering the judgment of the Court:—

In the Native Commissioner's Court, plaintiff sued the defendant for £60 being damages or as compensation for the killing by defendant of plaintiff's sister's illegitimate son. The particulars of the claim are to the effect that the deceased was an inmate of, and contributed towards, the upkeep of plaintiff's kraal.

Defendant admitted the killing but disclaimed liability, as such killing was accidental and that in fact no damage was suffered by plaintiff. It is common cause that defendant had been convicted for the homicide.

Plaintiff's evidence stands alone regarding the loss and damage alleged to have been suffered, while defendant led no evidence at all.

The Assistant Native Commissioner, in deciding the matter under Common Law, absolved defendant from the instance, and against this decision an appeal is now lodged on the grounds, in the words of the appellant, who was not represented, that "I want to be compensated for my child who was killed by respondent".

The propriety of applying Common Law to this case is, in our opinion, open to question, but, as will be shown, the result so far as allowing or dismissing this appeal is concerned, must be the same whether Common or Native Law is applied.

Under Common Law, plaintiff in a case like this, must show that he has suffered patrimonial loss through being deprived of benefits, whether in the form of maintenance or services, rendered by the deceased *under a legal duty to do so.* See Union Government *v.* Warneke, 1911, A.D., 666.

In the present instance the deceased was the illegitimate son of plaintiff's sister. As such it cannot by any stretch of South African legal principles be said that deceased was under any legal duty in law to support the plaintiff. Such cases as Union Government *v.* Warneke, *supra;* Mokwena *v.* Laub· 1943, W.L.D., 63, etc., have in general restricted the circle of relationship, within which the duty of support legally exists, to the immediate family, i.e. husband and wife; parent and child; and in some cases grandparent and grandchild. Uncle and nephew are not included, and uncle and illegitimate nephew would *a fortiori* fall similarly outside these radii.

In Common Law, therefore, plaintiff cannot be held to have a cause of action.

Under Native Law it has been held, notably in the case of Dhlamini *v.* Ngubane, 1, N.E., 14, that in claims arising from homicide, specific damage and calculable pecuniary loss must be proved beyond doubt.

In an endeavour to substantiate his claim of patrimonial loss, plaintiff could say no more than that "at times in two or three months he used to send me £6", and, "deceased used to assist me in ploughing my fields". These alleged remittances were not regular payments and there is nothing to show that they had not already ceased when deceased was killed or would not have been discontinued, had he lived. They could be regarded, in the opinion of this Court, as no more than sporadic gifts. Nor is the claim of loss of deceased's services on firmer ground. That deceased assisted in ploughing plaintiff's lands is only plaintiff's story, but even if it is accepted, the value of the inference that damage has been caused by the withdrawal of such assistance by deceased's death is practically eliminated by the fact that, as plaintiff himself admitted, deceased used to work in Durban and Johannesburg, and was so employed prior to his death. The amount of assistance, therefore, he could have given at home is problematical. Further, one—at least—of plaintiff's sons was able and did, in fact, assist him in the fields. Thus, neither damage nor calculable pecuniary loss has been proved and, in Native Law also, plaintiff must fail.

The appeal is therefore dismissed with costs.

It might be pointed out that in the opinion of this Court, defendant is in all the circumstances entitled to judgment in his favour but, as no cross-appeal on this ground has been noted, the Assistant Native Commissioner's judgment of "absolution" will not be disturbed.

Appellant in person.

Respondent in default.

Decided cases referred to:—

Union Government *v.* Warneke, 1911, A.D., 666.

Mokwena *v.* Laub, 1943, W.L.D., 63.

Dhlamini *v.* Ngubane, 1, N.E., 14.

CASE No. 2 OF 1951.

ZEPHANIAH MAHAYE (Appellant) *v.* MPIYENA MABASO (Respondent).

(N.A.C. Case No. 113/50.)

VRYHEID: Wednesday, 3rd January, 1951. Before Steenkamp, President, Israel and Thompson, Members of the Court (North-Eastern Division).

Law of Delicts—Damages for adultery—Maintenance of child born in adultery.

Held: That ignorance on the part of the paramour, that the woman is married, is alone not sufficient to bar a claim for damages and that in addition to the ignorance, it must be clear that the woman was actually living apart from her husband in such circumstances as to lead one to beleive that he had abandoned her.

Held: That there can be no doubt that the husband had been dilatory to such an extent that his wife and her brother, with whom she was living, were under the impression that he had abandoned her, and he cannot therefore succeed in a claim for damages under Native Law and Custom.

Held: That according to Native Law and Custom, only the person who has the property rights in the child is liable to pay "isondhlo" and that the husband of a woman has the property rights in her adulterine child and cannot claim maintenance from the natural father.

Appeal from the Court of the Native Commissioner, Mahlabatini.

Steenkamp (President), delivering the judgment of the Court:—

In the Native Commissioner's Court the plaintiff, now appellant, sued the defendant, now respondent, for two head of cattle as damages for having caused the pregnancy of plaintiff's wife. He also claims that defendant should maintain the child up to the age of 16 years.

In his plea the defendant admitted intercourse, but stated that plaintiff's wife, Tolwapi, was a woman of loose morals. He did not know she was married, as she lived at her father's kraal as an unattached woman.

After evidence had been adduced by both parties, the Native Commissioner entered judgment in favour of defendant with costs. This judgment is now attacked on appeal.

The Native Commissioner found proved the following facts:—

1. That plaintiff and his wife, Tolwapi, had entered into a customary union on the 10th June, 1947. The union was registered in Melmoth.
2. After having lived together for a short while, the said Tolwapi returned to her own people's kraal in this district, where she lived in circumstances which led others to believe she was an unattached woman.
3. During Tolwapi's stay at her people's kraal defendant cohabited with her.

The claim is under Native Law and Custom, and the Native Commissioner has tried the case under this system of law.

At the outset, this Court wishes to state that ignorance on the part of the paramour alone is not sufficient to bar a claim. It must, in addition to ignorance, be clear that the woman was actually living apart from her husband in such circumstances as to lead one to believe that he had abandoned her.

From the evidence it transpires that the woman, Tolwapi, was not of virtuous character as she had actually promised to marry the defendant and that her people had agreed to it. She gave evidence on behalf of plaintiff and further stated that she had been staying with her people a long time because her husband had not paid lobolo for her and that this was the reason why she went and lived with her people. Her brother also gave evidence on behalf of plaintiff and in answer to the Court, stated as follows:—

> "During the time Tolwapi was at home I did not know where plaintiff was. I needed my lobolo. During her stay at my kraal plaintiff never enquired about his wife. I was under the impression she was abandoned. I came to the Native Commissioner to ask advice what to do, seeing plaintiff did not pay lobolo or come to fetch his wife."

Plaintiff was so remiss about the movements of his wife that her own people came to the conclusion that he had abandoned her.

The proviso to Section 138 of the Code reads to the effect that no claim for damages can succeed if at the time of the adultery the woman and her husband were not living together as man and wife.

In the case of Caluza *v.* Mpini, 1901, N.H.C., 61, the Native High Court refused to award damages as it was apparent the woman was a loose character.

In Zalukazi *v.* Mtwazi, 1904 N.H.C., 45, it was argued that if a husband contributes by neglect to commission of adultery, then he forfeits his right to claim damages. That case was not finally decided as the record had to be returned for evidence, but it is desirable to quote the remarks of Boshoff (J) where he states—"it is necessary to call evidence as to how far the husband's treatment contributed to the wife's conduct".

In Mhlazana *v.* Nomalomo and Another., 1916, N.H.C., 101, the majority decision was to the effect that an absence of twelve months by the woman at her people's kraal can hardly be construed as to say that she was no longer living with her husband, especially as her father had taken her away from her husband's kraal to have her medically treated. Chadwick (J) dissented from the judgment of the majority and in doing so he is reported to have stated:—

> "With regard, however, to damages against the corespondent I am not in accord, because I think the woman was not living at that time with her husband. She had been away from him for more than a year, and not only that, but the Code provides that no damages shall be awarded unless the woman is at the time living with her husband, and the policeman is not supposed to know that she had not left him altogether. I think, therefore, no damages should be given against the policeman. Moreover, I want to point out what was the original law amongst the Natives. Before we had these Codes, damages were not given for adultery, because it was held that to give damages for adultery was an encouragement for husbands to connive with their wives to go about the country and commit adultery. The Code has altered that but according to the old original custom they did not allow damages for adultery. A man who went to claim damages for adultery would be regarded as departing from the usual custom and trying to make a profit out of the adultery of his wife. We have introduced damages in the Code."

In Tshezi *v.* Mapanga, 1933, N.A.C. (T. & N.), 35, adultery was committed some months after the wife had deserted her husband, and the Court came to the conclusion that as the woman was deliberately living apart from her husband at the time the adultery is alleged to have been committed, the husband is not entitled to damages.

Here it should be paused to point out that the Code of 1891 (Section 209), used the words "living with her husband", whereas the Code of 1932 (Section 87) reads "living together as man and wife".

We are opinion that there is not much difference in the meaning of the two sections and on reference to Sitole *v.* Sitole, 1936, N.A.C. (T. & N.), 79, it is found that the Court was called upon to give an interpretation of Section 138 of the Code. The Court then laid it down that the question of contributory negligence of the innocent spouse should definitely be a deciding factor. For example: (*a*) an apathetic or a dilatory husband would be met by a just bar to his action; (*b*) an errant wife would not be given licence to licentious conduct at her free will; (*c*) a designing scoundrel would not be protected by the bar. In that case the majority of the Court would seem to have been influenced by the fact that the paramour had enticed the woman away from her husband designedly and had been the direct cause of the estrangement and therefore it was held he was not entitled to protection in equity or in law.

In a later case of Kanyile *v.* Sitole, 1945, N.A.C. (T. & N.), 28, the husband left the wife at his kraal when he went to work and maintained her. No sooner was the husband advised of his wife's pregnancy by another man, than he immediately returned and instituted action. The Court held there is nothing to show that the husband at any stage acquiesced in the position created by his wife nor has he been shown to have been negligent or to blame for the position and therefore was not barred from recovering damages.

In the case now on appeal there can be no doubt that the husband had been dilatory to such an extent that his wife and her brother, with whom she was living, were under the impression that he had abandoned her, and he cannot therefore succeed in a claim for damages under Native Law and Custom.

The plaintiff has advanced the argument that according to his evidence he did not want his wife to live with him as he was afraid she would become pregnant and he gives this as the reason why he did not visit her. In the opinion of this Court this excuse is untenable and if that had been a genuine reason, he could have written regularly to his wife; enquired after the welfare of herself and the child, and would have arranged with her people for her to live at their kraal, but instead of that his conduct was such that she and her people gained the impression that she had been abandoned.

There is the claim for the maintenance of the adulterine child. According to Native Law and Custom under which this case was brought, only the person who has the property rights in the child is liable to pay "isondhlo". In this case the husband of the woman has the property rights in the child and he cannot claim maintenance from the natural father. He must support the child.

The claim for £5. 5s., being medical treatment of the woman while pregnant, cannot be allowed, as there is no medical evidence that the treatment was necessary as a result of the pregnancy. The only evidence by plaintiff is that he spent £5. 5s. in medical fees and while we do not hold that defendant is liable for prenatal expenses, yet it is felt that he might be so liable if plaintiff is able to prove the disbursement. He has not proved this and therefore cannot succeed.

This Court has considered the question whether a litigant who brings an unsuccessful claim under Native Law and Custom can afterwards sue under Common Law, and is of opinion that once a litigant has chosen one system of law, he must abide thereby and cannot, if unsuccessful, select another, perhaps more favourable system, as it is in the public interest that finality in litigation must be reached.

The appeal is dismissed with costs.

Appellant in person.

For Respondent: Mr. Conradie of Messrs. Conradie & Wright, Vryheid.

Decided cases referred to:—

Caluza *v.* Mpini, 1901, N.H.C., 61.

Zalukazi *v.* Mtwazi, 1904, N.H.C., 45.

Tshezi *v.* Mapanga, 1933, N.A.C. (T. & N.), 35.

Sitole *v.* Sitole, 1936, N.A.C. (T. & N.), 79.

Kanyile *v.* Sitole, 1945, N.A.C. (T. & N.), 28.

Statutes, etc. referred to:—

Section 209, Code of Native Law, 1891.

Sections 87 and 138, Natal Code of Native Law (Proclamation No. 168 of 1932).

CASE No. 3 OF 1951

MDEPA MKIZE (Appellant) *v.* **NDUNA MDUNGE (Respondent).**

(N.A.C. Case No. 100/50.)

PIETERMARITZBURG: Tuesday, 16th January, 1951. Before Steenkamp, President, Israel and Oftebro, Members of the Court (North-Eastern Division).

Native Law and Custom—Lobolo—Number due after Induna has been removed from office.

Held: That the removal of an Induna by the Government from one Chief to another, under whom he does not act as Induna, is equivalent to a direction by the Native Commissioner for the termination of such appointment and that if he thereafter gives his daughter in marriage, he is only entitled to the lobolo applicable to commoner's daughters.

Appeal from the Court of the Native Commissioner, Pietermartizburg.

Steenkamp (President), delivering the judgment of the Court:—

The Notice of appeal reads as follows:—

"1. The learned Native Commissioner erred in holding that the appellant herein was, in law, not entitled to receiving 15 head of cattle.

2. In any event, upon the evidence, the learned Native Commissioner should have found for the plaintiff."

It has repeatedly been held that where appeal is noted against the law, the law involved should be stated briefly, *vide* Rule 10 (*b*) of the Native Appeal Court rules.

The plaintiff is suing the defendant (now respondent), for five head of cattle or their value, and in his claim and evidence he states that as he was at one time an Induna under Chief Somquba, he is entitled to 15 head of cattle, *vide* Section 87 of the Code. He was removed from the jurisdiction of Chief Somquba and became a resident under Chief Ndhlovu. The removal was made by the Government, as the farm where the plaintiff was an appointed Induna was excised from the Native Reserve and now falls within an area controlled by the Municipality of Durban. Plaintiff was not appointed an Induna under Chief Ndhlovu.

Section 17 (2) of the Code reads as follows:—

"A Chief may, with the approval of the Native Commissioner terminate the appointment of a Chief's deputy in respect of any section of his tribe and when so directed by the Native Commissioner, must terminate any such appointment . . . ."

In the opinion of this Court the removal of the plaintiff by the Government from one Chief to another is equivalent to a direction by the Native Commissioner for the termination of an appointment. The plaintiff had consented to his removal, and as he was not an Induna at the time he gave his daughter in marriage, he is only entitled to lobolo applicable to that of a commoner's daughter.

The appeal is dismissed with costs.

For Appellant: Adv. J. H. Niehaus, instructed by Messrs. Raulstone & Co., Pietermaritzburg.

For respondent: Adv. J. Hershensohnn, of Pietermaritzburg.

Statutes, etc. referred to:—

Section 17 (2), Natal Code of Native Law (Proclamation No. 168 of 1932).

Section 87, Natal Code of Native Law (Proclamation No. 168 of 1932).

CASE No. 4 OF 1951.

EPHRAIM MVEMVE (Appellant) *v.* CAROLINE MKATSHWA (Respondent).

(N.A.C. Case No. 106/50.)

PIETERMARITZBURG: Wednesday, 17th January, 1951. Before Steenkamp, President, Israel and Oftebro, Members of the Court (North-Eastern Division).

Practice and Procedure—Summons—drafting of—must state whether damage claimed under Common Law.

Held: That when a girl sues for damages under Common Law, it should be alleged in the summons in unequivocal terms that she is suing under that system of law.

Appeal from the Court of the Native Commissioner, Pietermaritzburg.

Steenkamp (President), delivering the judgment of the Court:—

Summons was issued in the Court below by Carolina Mkatshwa, exempted Native woman in her capacity as natural guardian of her minor daughter Florence Maude Mkatshwa.

On the first day of hearing and after a written plea had been filed, application, which was granted, was made to substitute the name of the plaintiff to read:—

> "Florence Maude Mkatshwa, exempted Native woman in her capacity as natural guardian of her minor daughter Carolina Maude Mkatshwa."

It is apparent that when summons was issued, the names of the woman and the daughter were reversed and the amendment became necessary to clarify the position. Common law was applied, which means that damages were claimed by the guardian on behalf of her minor daughter Carolina.

This Court is constrained to point out that more care should be exercised in the drafting of such an important document as a summons, and it should be made absolutely clear in the summons and the evidence that when a girl sues for damages under Common Law, that fact should be stated in unequivocal terms.

The first witness was the mother, Florence, and she opens her evidence with the words "I am plaintiff". This gives the impression that she was claiming damages under Native Law and Custom, and this Court has to stretch its imagination almost to breaking point to come to the conclusion that the action was under Common Law. The pleadings should be drawn up in such a manner that no doubt is left in the mind of the Court as to what the intention was. Let this be as it may, the Court below decided the case under Common Law and this Court, in dealing with the appeal will similarly adjudicate in the matter. Even under Common Law a guardian can sue in his own name as representing the minor, or the minor assisted by the guardian may sue.

For Appellant: Mr. McGillewie of Messrs. McGillewie & Co., Pietermaritzburg.

For Respondent: Mr. Kirby of Messrs. Tomlinson, Francis & Co., Pietermaritzburg.

CASE No. 5 OF 1951.

MXOTSHWA ZIQUBU (Appellant) *v.* **EDMOND MTSHALI (Respondent).**

(N.A.C. Case No. 135/50.)

PIETERMARITZBURG: Wednesday, 17th January, 1951. Before Steenkamp, President, Israel and Oftebro, Members of the Court (North-Eastern Division).

Native Law and Custom—Seduction—Damages—in Natal—where seduced died.

Held: That the fact that pregnancy lowered the seduced's vitality and thus rendered her more susceptible to other illness or disease, does not negative the requirements of Section 137 (3) of the Natal Code of Native Law (Proclamation No. 168 of 1932).

Appeal from the Court of the Native Commissioner, Pietermaritzburg.

Israel (Permanent Member), delivering the judgment of the Court:—

Steenkamp (President), dissented.

Steenkamp (President): The plaintiff (now appellant) sued the defendant (now respondent) in the Native Commissioner's Court for two head of cattle or their value £11 being damages as a result of defendant having seduced plaintiff's daughter, Gladys, whom it is alleged, died as a result of childbirth.

The Native Commissioner gave judgment in favour of defendant with costs and against this judgment an appeal has been noted to this Court on the following grounds:—

1. The judgment is against the weight of evidence in that upon the testimony adduced before the Court the learned Native Commissioner should have given judgment for the plaintiff as prayed with costs.

2. The judgment is contrary to law.

There are two phases to this case, namely (1) was defendant responsible for Gladys' pregnancy; and (2) did she die as a result of childbirth.

The only direct evidence concerning the seduction is that of a girl Elsie, who was a friend of the late Gladys. Most of her evidence was hearsay but her testimony, shorn of the inadmissible evidence, leaves sufficient admissible evidence to enable the Court to decide whether there is *prima facie* evidence on which a judgment could be found in favour of plaintiff

The Assistant Native Commissioner, in his reasons for judgment, states that no fault could be found in the manner in which Elsie gave her evidence, but unfortunately the Assistant Native Commissioner seems to have been unduly influenced by the fact that when the case was tried on a previous occasion, and when absolution judgment was granted, Elsie was not called upon to give evidence. We do not think this should have militated against plaintiff's case as in the present proceedings the omission made in the previous case is rectified. If Elsie is not disbelieved, then her evidence is acceptable, notwithstanding the previous omission to call her.

Plaintiff himself gives evidence and states that defendant and the late Gladys were lovers and that she had no other lover. His evidence, therefore, corroborates Elsie to a certain extent. This, however, is not all. It has been held that a girl's evidence as to seduction is sufficient, if not denied on oath, and even then, if defendant's evidence is such that it cannot be believed, then the girl's evidence is sufficiently corroborated.

In the present case the defendant admits that he and Gladys were lovers but he bases his defence on the allegation that he and Gladys had ceased to be lovers some time before she became pregnant. The Assistant Native Commissioner remarks in his reasons that defendant denies he made the admission that he was responsible for Gladys' pregnancy. He does not comment on defendant's demeanour in the witness box except by stating that defendant's evidence was slightly confused. Defendant having admitted that he and Gladys were lovers, the onus rests on him to prove that she was not a virgin when they became lovers. He has not done that and therefore he is responsible for damages for seduction. The circumstances under which Gladys became pregnant very much indicate defendant as being the person responsible. Gladys was seven months pregnant in July when she had the miscarriage, therefore conception must have taken place about December, 1948. Defendant states his relationship with Gladys ceased in August, 1948, because she was then found with him at the butchery and her father fined him £5. He admits Gladys visited the butcher's shop in November and December, 1948, and also in January, 1949. He also admits he did not actually reject her and states that

after he was fined £5 he made an appointment with Gladys to meet him at midnight, but she did not keep the appointment and they quarrelled because she kept him waiting. It therefore seems that the fine of £5 (if such a fine had been imposed) did not deter the defendant from meeting Gladys at midnight. In other words, he was still Gladys' lover after August, 1948.

Taking the evidence as a whole, there cannot be any doubt that defendant was responsible for the pregnancy.

Whether the claim was extinguished in terms of Section 137 (3) of the Code is a question based entirely on the medical evidence adduced by plaintiff. The cause of death is given by Dr. Norwel as lobar pneumonia, but he admits that when she was admitted to hospital on the 2nd August, 1949, she had swelling of the legs and congestion of the lungs. The congestion commenced about a week previous to the admission to hospital. The swelling of the legs was due to a kidney condition which is aggravated by pregnancy, which makes the risk much greater. The pneumonia is attributed to the invasion of the germ when resistance is lowered, and the lowered resistance was caused by the pregnancy. The medical evidence is also that if the girl had not been pregnant and delivered of a child, the chances are that she would have lived.

From this evidence I hold the view that although the cause of death is pneumonia, there can be no doubt that the pregnancy of a girl suffering from an unhealthy kidney, is the direct cause of her death. The true position is that a woman does not usually die from childbirth but from the complications following the birth and this is what occurred in the present case and therefore it is my view that the protection given by Section 137 (3) of the Code is inapplicable in the present case and plaintiff must succeed.

In my opinion the appeal should be allowed, but as the majority of the Court is against me, it is not necessary to state what my judgment would have been.

Israel (Permanent Member): With all deference to the learned President, I cannot agree that the appeal should be allowed.

In the Native Commissioner's Court, plaintiff (appellant in this Court) sued defendant for the "nqutu" and "mvimba" beasts or their value £11 by reason of seduction of the former's daughter by the latter, as a result of which she was delivered of a child. It was established that the child was delivered on the 20th July, 1949, and the plaintiff's daughter, its mother, died some twenty days thereafter. Defendant denied the seduction and the Acting Additional Native Commissioner gave judgment for him, holding that it had not been proved (*a*) that plaintiff's daughter had died from childbirth, or (*b*) that defendant had seduced her and caused her pregnancy.

It is against these findings that appeal is now noted. In view of the provisions of Section 137 (3) of the Natal Code of Native Law, whereby a claim for damages in respect of seduction is extinguished by the death of the seduced female, provided it was not due to childbirth consequent upon the seduction, it is clear that the crisp point for decision is whether the death of plaintiff's daughter was proved to have been caused by the delivery or not. Only if the answer is in the affirmative need the liability of the defendant be investigated.

The medical practitioner who gave evidence before the Acting Additional Native Commissioner certified the cause of death as lobar pneumonia. He stated that he had examined plaintiff's daughter ten days after she had given birth, and found her suffering from congestion of the lungs which, in his opinion, may have commenced a week earlier, combined with what he considered was nephritis, a kidney condition. This condition

might have been there prior to and after childbirth, and the witness was of opinion that it was this, aggravated by her pregnancy, which had lowered the deceased's resistance to the pneumonic infection from which she died, and not the actual confinement. He said: "In my opinion the delivery of the child did not cause the lowered resistance. The pregnancy caused it. A person could be quite well, might get kidney trouble and lowered resistance in consequence of pregnancy. If the girl had not been pregnant and delivered of a child, I think she would have lived." But under cross-examination the Doctor opined: "She could have had the nephritis in a chronic form before pregnancy, but may have developed it, on the other hand, during pregnancy. Had she sought medical advice earlier she might have been alive to-day." He later added, however, that nephritis is more prevalent amongst pregnant women than amongst those who are not, and is commonly seen in pregnancy, although a patient may have shown no signs of it before.

This is the only evidence on the point to be determined whether plaintiff's claim is well founded or is extinguished, and amounts to no more than that, the kidney trouble which accompanied, but did not necessarily arise from her pregnancy rendered plaintiff's daughter more vulnerable than she would otherwise have been to the pneumonia, from which she eventually died. But this is far from saying that she died as a consequence of giving birth to a child, which resulted from the alleged seduction, and the Acting Additional Native Commissioner was correct in holding that it had not been proved that that was so.

Plaintiff's claim, as indicated above, depends for its existence on that one point, and the onus of establishing it was on him, and he has failed to discharge that onus. [See Ndhlovu *v.* Sosibo, 1937 (T. & N.), at page 105.]

The appeal is dismissed with costs.

Oftebro (Member): I concur with the judgment of my brother Israel. In my opinion the provisions of Section 137 (3) of the Code are quite clear. Plaintiff can only succeed if he can establish that death was due to childbirth. The fact that her pregnancy lowered her vitality and thus rendered her more susceptible to other illness or disease does not, in my opinion, negative the requirements of the Section.

For Appellant: Adv. J. H. Niehaus, instructed by Messrs. Raulstone & Co., Pietermaritzburg.

For Respondent: Adv. J. Hershensohnn· of Pietermaritzburg.

Statutes, etc., referred to:—

Section 137 (3) of the Natal Code of Native Law (Proclamation No. 168 of 1932).

CASE No. 6 OF 1951.

JOSHUA SIMELANE (Appellant) *v.* **ANANIAS SIMELANE (Respondent).**

(N.A.C. Case No. 107/50.)

ESHOWE: Tuesday, 23rd January, 1951. Before Steenkamp, President, Israel and Leibbrandt· Members of the Court (North-Eastern Division).

Law of Property—Allotment of lands on commonage in Natal—Proclamation No. 123 *of* 1931.

Held: That as this is not a case between plaintiff and the owner of the ground, viz. the S.A. Native Trust, but against a defendant who, it is alleged, is attempting to deprive a bona fide occupier of fruits grown on the land, namely the trees which belong to the soil, the plaintiff's clalim is one for damages and not for a declaration of rights.

Appeal from the Court of the Native Commissioner, Nkandhla.

Steenkamp (President), delivering the judgment of the Court:—

The plaintiff (now appellant), the only son of a civil marriage, sues the defendant (now respondent), his half-brother of a previous civil marriage, for an order granting him the ownership of a wattle plantation.

In his summons plaintiff avers that during the lifetime of their father, he bought wattle seed and caused these to be planted on ground occupied by his father, and for which his father gave permission and actually gave him the ground.

The defendant in his plea denies that plaintiff caused the wattles to be planted. The Native Commissioner, after plaintiff had given evidence, dismissed the summons with costs and gave a ruling that the plaintiff is out of Court because the land has never been allotted or specifically re-allotted to him by the Chief.

An appeal has now been lodged to this Court. Plaintiff's evidence on all material points is to the effect that his father allotted him the land on which the wattles are growing. He admits the Chief never allotted the land. According to Section *three* (1) of Proclamation No. 123 of 1931, being the Land Regulations in force in Natal and Zululand, a Chief or Headman shall allot to each married Native or kraalhead sufficient land for the requirements of his house or houses for arable or residential purposes. According to Section *two*, land occupied at the commencement of the Proclamation shall be deemed to be lawfully occupied unless and until proof to the contrary be adduced.

Proclamation No. 123 of 1931, came into force on the 27th March, 1931, and if plaintiff had been occupying the ground on that date, then it might be argued that he was in lawful occupation in terms of the Proclamation, but according to the dates given by the plaintiff he could not then have been in occupation. He states that before his father's death, which took place about seven years ago, he sent the wattle seeds and asked his father to have them planted. He came home on leave from Melmoth, where he was working during 1944, and found the plantation grown, and caused someone to be employed to strip it. He subsequently, during 1948, stripped the plantation. Plaintiff, however, does not base his right to the ground on an allegation that he had lawfully occupied it in 1931, but that it was allotted to him by his father.

His father had no right to allot ground to any of his sons as, according to Section *nine* of the Proclamation, on the death of an occupier, the ground reverts to commonage.

Plaintiff might have been a bona fide occupier of the ground and according to what is stated in Maasdorp, Vol. II, 7th Edition, page 57, such an occupier or possessor acquires only the fruits gathered by him before the *litis contestatio*.

This is not a case between plaintiff and the owner of the ground, viz. the South African Native Trust· but against the defendant who, it is alleged, is attempting to deprive a bona fide occupier of the fruits grown on the and, viz. the trees which belong to the soil. If plaintiff reckons he is entitled to the trees which he alleges defendant has disposed of, then his claim is one for damages and not for a declaration of rights.

The appeal is dismissed with costs.

For Appellant: Mr. W. E. White, instructed by Messrs. Henwood & Co., of Vryheid.

Respondent in person.

Statutes, etc., referred to:—

Section 3 (1), Proclamation No. 123 of 1931.

CASE No. 7 OF 1951.

BUNYWANA NTULI (Appellant) *v.* MAZOBEYANA NZUMALO (Respondent).

(N.A.C. Case No. 126/50.)

ESHOWE: Tuesday, 23rd January, 1951. Before Steenkamp, President, Israel and Leibbrandt, Members of the Court (North-Eastern Division).

Practice and Procedure—Alterations in records.

Held: That judical officers should not act in a matter which might cause the suspicion that they are displaying a disregard of that feeling of respect for the record which should animate all judical officers.

Appeal from the Court of the Native Commissioner, Nkandhla.

Steenkamp (President): I agree that the appeal should be allowed.

In his reasons for judgment the Assistant Native Commissioner states as follows:—

> "The fact that plaintiff could not, on his own admission, describe the cattle in examination in chief but accurately describes them under cross-examination made the Court very suspicious of his case."

On reference to the original record I find that the words "said could not describe the cattle" are bracketted and are inserted in small writing after the sentence "Defendant's sister jilted me and I did not marry her". The original record is in a bold handwriting whereas the words in brackets are purposely in small handwriting to enable them to be adequately inserted in the only open space.

Counsel for respondent in his argument, informed the Court that when a certain question was put to the plaintiff in cross-examination, the Assistant Native Commissioner remembered that plaintiff could not describe the cattle, and then inserted a note to that effect. The Assistant Native Commissioner was ill-advised to have done so without an explanatory note.

In the case of Rex *v.* Poswayo, 1937, E.D.L., Pitman, A.J.P., is reported to have remarked "there can be no doubt that the Magistrate's action in altering the form of verdict in what we cannot but consider a material point was highly irregular".

Judical officers should not act in a matter which might cause the suspicion that they are displaying a disregard of that feeling of respect for the record which should animate all judical officers.

For Appellant: Mr. S. H. Brien, instructed by Messrs. Raulstone & Co., Pietermaritzburg.

For Respondent: Mr. L. T. Buss of Kranskop.

Decided case referred to:—

Rex *v.* Poswayo, 1937, E.D.L., 294.

CASE No. 8 OF 1951.

JOSHUA SIMELANE (Appellant) *v.* ANANIAS SIMELANE (Respondent).

(N.A.C. Case No. 108/50.)

ESHOWE: Tuesday, 23rd January, 1951. Before Steenkamp, President Israel and Leibbrandt, Members of the Court (North-Eastern Division).

Law of Succession—Natives in Natal—Married by Christian rites before or after Native Administration Act, 1927.

Held: That it is important to prove the conditions of a marriage by Christian rites so as to establish the law under which the property must devolve.

Held: That so long as a widow is alive and intends returning to the kraal where she lived, the heir, in Native Law, is not justified to remove the cattle from the kraal where she resided during her husband's lifetime.

Appeal from the Court of the Native Commissioner, Nkandhla.

Steenkamp (President), delivering the judgment of the Court:—

This is an appeal from the Chief's Court where the plaintiff (now respondent) sued the defendant (now appellant) for five head of cattle.

The Chief gave judgment in favour of plaintiff which was confirmed by the Native Commissioner.

An appeal has now been noted to this Court. From the pleadings and the evidence it appears that the late Aloni Simelane, father of the parties, first married Widi (also called Eddie) by civil rights. He had two children, twin boys, by her, namely the plaintiff, and one Azariah. After the death of Widi he married Evelina, also by civil rights, and by her he had one son, Joshua, the defendant. After Evelina's death, Aloni married a woman by the name of Nomhlango, a widow, also by civil rights. There was no issue with the third wife.

The defendant is a married man with his own kraal and therefore it must be accepted that his mother, Evelina, was married prior to the promulgation of the Native Administration Act, No. 38 of 1927. This being the case, Natal Law No. 46 of 1887 applies, being the law regulating the marriage of Natives by Christian rites.

There is no evidence of the date when Aloni married Nomhlango. The only indication as to the approximate date is in the register of "Succession and Native Agreements and Appointments of Heirs" handed in at the trial, in which appears a statement by Aloni dated the 20th November, 1939. In this statement, which will again be referred to, the late Aloni stated that he was recently married to Nomhlango.

The date of marriage is important for the reason that according to Law No. 46 of 1887 (Natal), Section *eleven,* which was tacitly repealed by Act No. 38 of 1927 [*vide* Mvelase *v.* Mbhele, 1946, N.A.C. (T. & N.), 94], civil marriages do not

remove the parties from the operation of Native Law. From this it follows that if Nomhlango's marriage was subsequent to the 1st January, 1929, when Chapter V of Act No. 38 of 1927, came into force, the Estate of the late Aloni should be administered as if the parties had been Europeans, unless community of property was excluded when they got married. The record is silent as to whether the marriage was in community of property or whether community had been excluded. If the marriage had been in community then the implications of our Common Law and of Act No. 13 of 1934 (amendment of Intestacy Law) are applicable.

There is also no evidence whether Aloni, when he married his first or his second wife, entered into an antenuptial contract. He might have done so, in which case the estates as they existed at the time of the death of Widi and again at the time of the marriage to Evelina are affected.

I have tried to point out how the legal issues might be affected if certain facts existed on which we have no evidence. Plaintiff in his evidence states that after the death of his father Aloni, the widow Nomhlango lived at the kraal of the eldest son of the second marriage, namely the defendant, which was also the kraal of the late Aloni. Plaintiff had established his own kraal during the lifetime of his father.

The five head of cattle being the issue of the case, were the property of the late Aloni, but plaintiff permitted the cattle to remain at defendant's kraal for the support of the widow, Nomhlango, and they were duly registered for dipping purposes in defendant's name. Plaintiff admits the cattle were kraal property. The woman Nomhlango has now left defendant's kraal and is living with Mtshali, her son by a former marriage, and plaintiff claims that he, as heir to their late father, is now entitled to the possession of the cattle. There is a conflict of evidence as to whether Nomhlango has left defendant's kraal permanently. She states she went to Mtshali, who has lost his wife, to look after the children and she intends to return to the defendant's kraal as soon as Mtshali, who is looking for a wife, gets married.

Defendant and the widow, Nomhlango, however, claim that the late Aloni, before his death, donated the cattle in question to her. Plaintiff states he knows nothing about such a donation but defendant is borne out by the statement, already referred to, made by Aloni at the Native Commissioner's office. In this statement it is recorded by Aloni as follows: "I have also presented to my wife, Nomhlango ka Charlie, to whom I was recently married, five head of cattle.

To the plaintiff's claim the defendent pleaded as follows in the Native Commissioner's Court:—

> "Firstly defendant denies that plaintiff has *locus standi* to sue defendant for the property in dispute. *Alternatively* that the property in question is house property belonging to the house of Nomhlango Simelane, the widow of plaintiff's late father and plaintiff is not entitled to the property as the widow is still resident in plaintiff's father's kraal and plaintiff is not supporting her and is not the head of the kraal where she resides.
>
> Further alternatively that the property in question were gifted by plaintiff's later father Aloni Simelane to Nomhlango and she is still alive."

During the course of the hearing of the action on a question by the Court to the attorney for the defendant it was intimated that the first plea lapses. The plea does not seem to be very much in point except the allegation that the woman is still resident in plaintiff's father's kraal where the head is the defendant. The rest of the plea really amounts to *jus tertius*. As far as the question of the gift is concerned I do not think we need unduly labour this aspect in the present case.

The grounds of appeal are as follows:—

(1) The judgment is bad in law in that it was not competent for the Court to award the cattle to respondent before the question of heirship in the Estate of the late Aloni is decided.

(2) The Court did not find that respondent was the heir to the Estate of Aloni, and consequently he has no *locus standi* to institute or possess the house property he claims and in any event there is no evidence on record that Nomhlango's house is heirless.

(3) The uncontradicted evidence of Nomhlango did not established nor did the Court find that she had abandoned her late husband's kraal, and in any event she ate "Amasi" from the cattle claimed during her stay at the kraal of Mtshali.

(4) In any event the judgment is bad in law and against the weight of the evidence.

Grounds (1) and (2) evidently are in respect of the allegation in the record that plaintiff is not the eldset son of the first wife and it might well be that his twin brother, Azariah, is the heir. I do not think there can be any doubt that plaintiff is the first born, but in the absence of any evidence as to whether the late Aloni was married in community of property or otherwise, it can not be laid down that the widow Nomhlango is not entitled to the property.

This Court agrees, notwithstanding the reasons by the Native Commissioner, that the evidence is not conclusive that Nomhlango has permanently removed herself from the kraal where she resided during her husband's lifetime. So long as she is alive and intends returning to the kraal, the heir is not justified in removing the cattle. Whether he will be entitled to claim the cattle after her death is another matter, and in the light of what has been stated above, he will have to prove certain important factors which, in the opinion of this Court, go to the very root of legal issues that are apparently involved.

The appeal is allowed with costs and the Native Commissioner's judgment is altered to read:—

"Appeal from Chief's Court is allowed with costs and the judgment altered to read:—

'Absolution from the instance with costs'."

For Appellant: Mr. W. E. White, instructed by Henwood & Co., Vryheid.

Respondent in person.

Statutes, etc., referred to:—

Native Administration Act, 1927 (Act No. 38 of 1927). Natal Law No. 46 of 1887; Section *eleven* Act No. 13 of 1934.

Decided cases referred to:—

Mvelase *v.* Mbhele, 1946, N.A.C. (T. & N.) 94.

CASE No. 9 OF 1951.

OSCAR NKWANYANA (Appellant) *v.* **NKEYANA NENE (Respondent).**

(N.A.C. Case No. 134/50.)

DURBAN: Tuesday, 30th January, 1951. Before Steenkamp, President, Israel and Hassard, Members of the Court (North-Eastern Division).

Practice and Procedure—Native Commissioner's Courts—Jurisdiction as regards persons—Use of word—"African" instead of "Native".

Held: To describe litigants in the summons as anything else but "Natives" would have placed the matter beyond the jurisdiction of the Native Commissioner's Court.

Appeal from the Court of the Native Commissioner, Durban.

Israel (Permanent Member), delivering the judgment of the Court:—

At the outset this Court notes that in both the summons and the particulars of claim each party is described as an "African" male. Chapter IV of the Native Administration Act, No. 38 of 1927, provides for the setting up of a judical organisation, and this Court and the Court *a quo* are the creatures of that particullar Statute, whereof Section *ten* constitutes Courts of Native Commissioner for the hearing of matters between *Native and native only*, and Section *thirteen* constitutes this Court as a Court of Appeal from Native Commissioners' Courts. It follows, therefore, that the persons over whom a Native Commissioner's Court and, in consequence this Court, have jurisdiction are Natives and Natives only, and the definition of Native in the Act contains no reference to "Africans".

This being so, the Native Commissioner *ex facie* the summons had no apparent jurisdiction in the matter and he would have been perfectly entitled *mero motu* and *in limine* in refusing to hear it. To describe litigants as anything else but "Natives" would have placed the matter beyond his jurisdiction. This error, if error it was, however, was only saved from being fatal by the Native Commissioner recording each witness, including the plaintiff and defendant as "a Native male". Had this not been so, this Court would have had no hesitation in rejecting the appeal on the grounds of lack of jurisdiction. A summons, on the face of it, must clearly indicate that the parties, as well as the cause of action, are within the jurisdiction of the Court out of which it was issued.

For Appellant: Adv. C. Cowley, instructed by Messrs. Cowley & Cowley, Durban.

For Respondent: Mr. Henderson of Messrs. Darby & Higgs, Durban.

Statutes, etc., referred to:—
Chapter IV of the Native Administration Act, 1927.

CASE No. 10 OF 1951.

GILBERT NXABA & ANR. (Appellants) *v.* **ENOCH NXABA & ANR. (Respondents).**

(N.A.C. Case No. 129/50.)

DURBAN: Tuesday, 30th January, 1951. Before Steenkamp, President, Israel and Hassard, Members of the Court (North-Eastern Division).

Law of Persons—Native Estates—Exempted or unexempted Natives in Natal.

Held: That once an estate is to devolve according to Native Law, the nearest blood relation is entitled to succeed, notwithstanding that that blood relation might have a status which brings him into the ambit of Roman Dutch Law principles.

Appeal from the Court of the Native Commissioner, Melmoth.

Steenkamp (President), delivering the judgment of the Court:—

The late Lee *alias* Alden Nxaba, an unexempted Native, died during 1932 and left certain immoveable property in the District of Melmoth, Zululand. He had been married by civil rites during 1924, leaving a widow who subsequently remarried. Lee left no issue and the Native Commissioner was called upon to hold an enquiry in terms of Section *twenty-three* (4) of Act No. 38 of 1927, and regulations issued thereunder, to determine the names of the heir or heirs entitled to inherit the estate.

The Native Commissioner, after calling all available evidence, gave the folliwing finding:—

> It is hereby ordered that the estate of the late Lee devolves by Native Law and Custom, upon the Estate of Charles Goodenough Nxaba and in terms of Section 4 (1), Government Notice No. 1664 of 1929, as amended, I hereby appoint Enoch Nxaba to represent same and to assume responsibility for the payment of debts and collection of assets and the general administration and distribution of the property, he is also empowered to pass transfer of the immovable property to the heirs in the Estate Charles Goodenough Nxaba.

An appeal has been noted to this Court by one Gilbert Nxaba on the following grounds:—

> 1. The decision was wrong in Native Law and Custom.
>
> 2. The Commissioner erred in excluding the possibility of the application of Common Law.
>
> 3. On the death of Leigh Nxaba in 1932, the following were his legal heirs: Ephraim, Miriam, Charles and Gilbert, and they became vested with their right to equal shares in the Estate of Leigh on his death in 1932. Thereafter Charles died in 1941 and any inheritance to his estate is only valid in respect of vesting at the day of his death in 1941. As he was an exempted Native the rights of his heirs depend upon the law governing exempted Natives. Ephraim died in 1902 without leaving children. Miriam died in 1948, but in each case their rights to succeed to the estate of Leigh had vested on his death in 1932 and no interpretation of Law can possibly deprive them of that vested right by reason of the subsequent death of Charles.

4. Costs of these proceedings should be paid out of the Estate and/or by the heirs.

To be able to follow the judgment, a genealogical tree is appended.

Lee was the son of Mtiki, who was the third son of John Nxaba. Lee's father and his grandfather, John Nxaba, both preceased him. He had no brothers and therefore we must look to his uncles to furnish an heir. Mtiki's eldest brother was George, an exempted Native. George, who predeceased Lee, had three sons of whom Ephraim, the eldest, died during the Boer War, leaving no male issue; then Charles Goodenough who died during 1941, i.e. after the death of Lee. Charles Goodenough had three children, of whom Enoch is the eldest, and who was appointed by the Native Commissioner to administer the estate. Charles Goodenough was an exempted Native and therefore his estate is to be administered according to Roman Dutch Law.

It is contended that as George, through whom Charles Goodenough inherited, was an exempted Native, it is not correct that the estate should devolve according to Native Law and Custom, and it is submitted that George's four children· viz. Ephraim, Charles Goodenough, Gilbert and Miriam, should inherit in equal shares.

With that contention, this Court cannot agree, as George never inherited from Lee and his name is only used to arrive at the nearset blood relation irrespective of whether or not George was an exempted Native.

Native Law and Roman Dutch Law agree in this respect that we have to look to the nearset blood relation to find an heir. There is this difference, however, that in Roman Dutch Law the nearest blood relations inherit in equal shares through their parents, whereas in Native Law and Custom the eldest son always inherits. Nowhere is it mentioned in Roman Dutch Law that we have to look at the status of a person to find an heir. Once an estate is to devolve according to Native Law, as it does in the present case, then we must find the nearest blood relation entitled to succeed, notwithstanding that that blood relation might have a status which brings him into the ambit of Roman Dutch Law principles.

According to Native Law and Custom a Native estate devolves immediately on the heir. When Lee died, his estate devolved according to the Native Law of Succession, on Charles Goodenough, who was then alive. It cannot, with any stretch of imagination, be said that the estate devolved on George, who had predeceased Lee.

The Native Commissioner has correctly dealt with the legal issues involved and, in a well considered judgment, he has come to the conclusion that the late Charles Goodenough Nxaba was the heir to the deceased Lee. This Court agrees with that finding and the appeal is accordingly dismissed with costs.

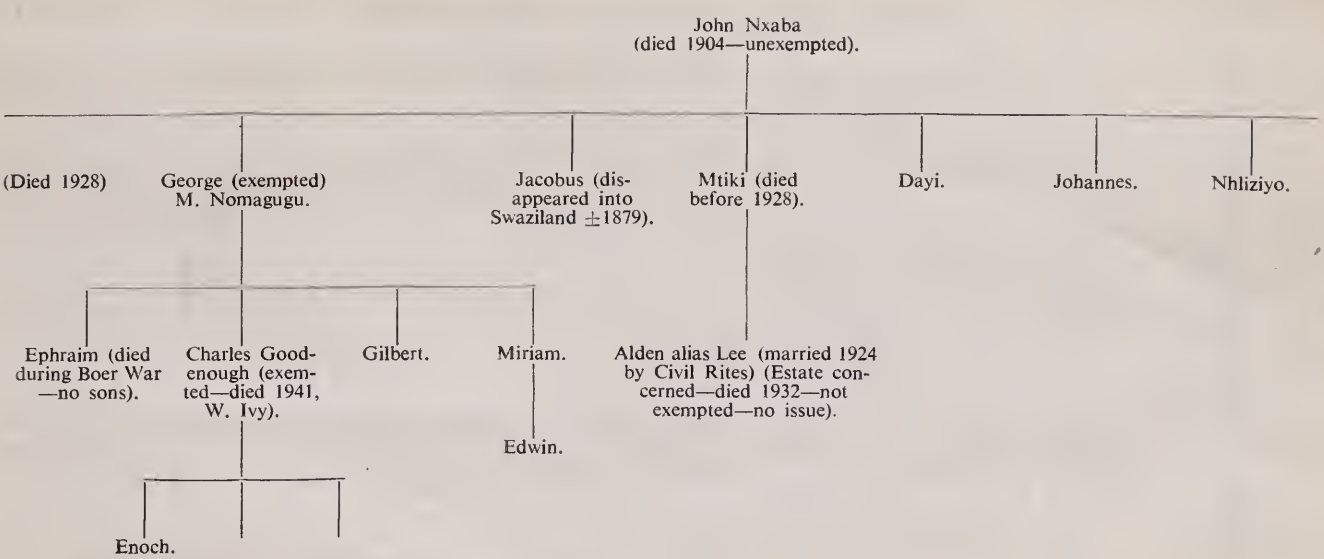
This Court is not prepared to grant costs of appeal against the Eestate, as the appeal was not noted for the benefit of the Estate, but in appellant's own interests.

For Appellants: Adv. Fowle of Messrs. Fowle & Driman, Durban.

For Respondents: Mr. Higgs, instructed by Messrs. Smithers & Smith, Stanger.

Statutes, etc., referred to:—

Section *twenty-three* (4) of Act No. 38 of 1927.
Section 4 (1), Government Notice No. 1664 of 1929.


John Nxaba
(died 1904—unexempted).
(Died 1928)
George (exempted)
M. Nomagugu.
Jacobus (disappeared into Swaziland ±1879).
Mtiki (died before 1928).
Dayi.
Johannes.
Nhliziyo.
Ephraim (died during Boer War —no sons).
Charles Goodenough (exemted—died 1941, W. Ivy).
Gilbert.
Miriam.
Alden alias Lee (married 1924 by Civil Rites) (Estate concerned—died 1932—not exempted—no issue).
Edwin.
Enoch.

CASE No. 11 OF 1951.

MERIAM MATSEGO (Plaintiff) *v.* **DAVID MATSEGO (Defendant).**

(N.D.C. Case No. 79/9/47.)

REVIEW OF TAXED BILL OF COSTS.

PRETORIA: Friday, 2nd March, 1951. Before Steenkamp, President (North-Eastern Division).

Practice and Procedure—Review of taxed Bill of Costs.

Steenkamp (President), delivering the judgment of the Court:—

The Registrar of this Court has taxed a Bill at the request of the client, who was the defendant in a divorce action instituted by his wife. The Bill submitted was for £11. 17s. 6d. fees and £8. 9s. 3d. disbursements, making a total of £20. 6s. 9d. It was taxed at £10. 4s., including Court fees, and has now been brought on review by the attorney. Notice of review was served on the clilent's new attorney, but he is in default.

Rule 37 of the Native Divorce Court Rules, published under Government Notice No. 1227 of 1934, prescribes that the scale of fees to be charged by attorneys and counsel shall be as prescribed for attorneys appearing in Magistrates' Courts.

Section *eighty* of the Magistrates' Court Act, No. 32 of 1944, prescribes *inter alia* in sub-section (4) that any person who is liable to pay costs of any civil proceedings may require that those costs shall be taxed by the Clerk of Court as between attorney and client. Sub-section (2) states that as between attorney and client, the Clerk of the Court may, in his discretion allow costs and charges for services reasonably performed by the attorney at the request of the client for which no remuneration is recoverable as between party and party and for which no provision is made in the rules.

In the present case, plaintiff, a Native woman, sued her husband, the defendant, for restitution of conjugal rights. The case was set down for hearing on the 20th November, 1947, but on that day plaintiff was in default, but she was represented by Mr. Harry Goss, an attorney of Johannesburg, who also issued the summons. The case was postponed to the 1st March, 1948, at the request of Mr. Goss. On the 1st March, 1948, both parties were present and plaintiff was represented by Mr. Sacks and defendant again by Mr. Resnik. The case was then, on application, postponed to the 26th August, 1948. On the latter date plaintiff was in default and as no Counsel appeared on her behalf, the summons was dismissed.

On the 28th August, 1950, Mr. Attorney H. M. Basner, of Johannesburg, submitted a Bill of Costs to the Registrar of this Court to be taxed on the basis of attorney and client, and at the request of his client. In the covering letter it is not stated who his client is, i.e. whether the plaintiff or the defendant, but in a letter dated the 4th September, 1950, from Messrs. Sadie & Sadie, Attorneys of Johannesburg, it is stated that they are acting for defendant, who was formerly Mr. Basner's client.

No order of costs was made by the Court and therefore each party was responsible for his/her own costs. In my opinion sub-section (2) of Section *eighty* of the Magistrate's Court Act, covers cases of this nature and the Registrar was legally empowered to tax the Bill of Costs at the request of the defendant. This sub-section reads, *inter alia,* "the Clerk of the Court may in his discretion (subject to review) allow costs and charges, etc.". The words "in his discretion" are somewhat wide, but at the same time I am of opinion that discretion must

be exercised in such a way that where a tariff is provided for the appearance of a legal representative in a party and party Bill of Costs, that tariff must be used as a guide. It is mentioned on page 155 of Jones and Herbstein that the wording of Section *eighty* (2) leaves the Clerk of Court with an unfettered discretion, but I still say it is a judical discretion, and from that it follows the charges must be reasonable.

The next question is whether in divorce proceedings the ordinary scale, or the higher scale should apply, and if the higher scale, whether "A" or "B" should be applied.

Rubin, in his book "The Law of Costs in South Africa" on page 197, states that where attorney and client costs are payable by an unsuccessful party, taxation should be stricter than where costs are payable by a client to his attorney.

It is provided in Table A of the Magistrate's Court Act, under note 1 (5) that where the amount in dispute is not apparent on the face of the proceedings, costs shall be computed at the lower rate, but the Court may, on application of either party, assess the amount in dispute.

In the proceedings no sum of money can be arrived at nor is any amount apparent, but divorce actions are important matters and while in Bills of Cost as between party and party the ordinary scale will have to be applied, can it be said that this scale should be used as a guide in divorce actions when an attorney and client bill is presented? In view of the fact that it is the policy, which is apparent from the Native Administration Act, read as a whole, that costs in Native cases should be kept at a low level, I hold the view that the ordinary scale should be used as a guide.

I have carefully considered the disbursements made in respect of payments made to an attorney at Pretoria to appear on behalf of the attorney of Johannesburg. There are three items, viz., No. 9, £3. 3s.; No. 15, £2. 2s. and No. 18, £3. 3s. These are not unreasonable when we take into consideration that if the attorney of Johannesburg had appeared personally, he would have had to charge a fee to cover his transport to Pretoria. Attorneys usually travel by motor car and if we reckon this at 1s. a mile, which is not unreasonable for professional men, then the costs to the client for each appearance would have been considerably more than what is charged for the service. I will therefore allow these items as charged in the Bill of Costs. It is noted that the Registrar only allowed 10s., 10s. and 30s. under these items. The attorney at Johannesburg is also entitled to charge for letters, and the perusing of those he received from the attorneys at Pretoria. The amounts charged for these, plus the disbursements made to the Pretoria attorney are less than what is would have cost the client if his Johannesburg Attorney had appeared personally. The Registrar allowed an item of £1—"Preparing for trial" (item 29 of the Magistrate's Court Tariff). This amount was not included in the Bill of Costs but was afterwards inserted. I will allow the item as the client has not applied for a review of this.

Items 20, 21 and 22 on the Bill of Costs are in respect of a case in another Court, and the Registrar of this Court has no jurisdiction to tax a Bill of Costs in respect of that case, and therefore I will disallow these items.

Item 1 is for £3. 3s. and while I appreciate that an attorney has to spend a considerable time in getting a statement from a client, I feel that £1. 1s. is a reasonable fee for this service.

The drawing of a plea (item 3) should not be allowed for more than that prescribed in the ordinary tariff, viz., 15s.

One original Bill, as presented, came to £12. 17s. 6d., in which is included £1 preparing for trial and which was added by the Registrar. The disbursement came to £8. 9s. 3d. The following items are disallowed by me, viz.:—

Item 1, reduced from £3. 3s. to £1. 1s.
Item 3, reduced from £1. 1s. to 15s.

I have also disallowed items 20: £3. 3s., 3s. 4d. plus 9d. disbursements, and 6s. 8d. being in respect of a case in another Court, as mentioned before.

The disallowances are therefore £2. 2s., 6s., £3. 3s., 3s. 4d. and 6s. 8d. on the fees side; total £6. 1s., and 9d. disbursements. The Bill, therefore, as amended by me is: Fees £6. 16s. 6d., and disbursements £8. 8s. 6d.; total £15. 5s. I have allowed 25 per cent. on £6. 8s. 6d., which amounts to £1. 12s. 1d., and 15 per cent. on 8s., being item 21—preparing Bill of Costs and Notice—which amounts to 1s. 2d.; total £1. 13s. 3d.

To this must be added fees of office, being stamps on Bill of Costs, 8s. 6d.; total of Bill £17. 6s. 9d.

The details of costs appear hereunder, and which must now be considered the Bill of Costs as allowed by the President.

Date.		Fees.			Disbursements.		
		£	s.	d.	£	s.	d.
18/9/47	1. Attending on client, etc....	1	1	0		—	
10/11/47	2. Letter to client requesting him to call.....	0	5	0	0	0	1½
14/11/37	3. Drawing plea.....	0	15	0		—	
	4. Fair copy for Court.....	0	2	0		—	
	5. Copies for service: Pretoria correspondent, and to keep.	0	3	0		—	
	6. Letter to Pretoria correspondent.....	0	5	0	0	0	1½
18/11/47	7. Attending on receipt of letter from Pretoria correspondent	0	3	4		—	
20/11/47	8. Attending on receipt of letter from client.....	0	6	8		—	
	9. Paid Pretoria correspondent for appearance on 20/11/48.		—		3	3	0
21/11/47	10. Attending on receipt of letter from Pretoria correspondent.	0	6	8		—	
25/11/47	11. Letter to client requesting him to call.....	0	5	0	0	0	1½
11/12/47	12. Letter to client requesting him to call.....	0	5	0	0	0	1½
7/1/48	13. Attending on receipt of letter from Attorney Goss.....	0	6	8		—	
9/1/48	14. Letter to client enclosing copy of letter from Mr. Goss....	0	7	6		—	
	15. Paid Pretoria correspondent for appearance on 1/3/48..		—		2	2	0
3/3/48	16. Attending on receipt of letter from Pretoria correspondent	0	6	8		—	
	17. Reporting to client.....	0	3	4		—	
	18. Paid Pretoria correspondent for appearance on 26/8/48.		—		3	3	0
27/8/48	19. Attending on receipt of letter from Pretoria correspondent	0	6	8		—	
	20. Preparing for trail.....	1	0	0		—	
	21. Bill of Costs and Notice....	0	8	0		—	
	15 Per cent on Bill of Costs (8s.).	0	1	2		—	
	25 Per cent. of Fees (Balance £6. 8s. 6d.).....	1	12	1		—	
	Add disbursements.....	8	8	6			
	£	16	18	3			
	Stamps taxation.....	0	8	6			
	Taxed and allowed at.....£	17	6	9			

For Appellant: Mr. Nankin, instructed by Mr. H. M. Basner, Johannesburg.

For Respondent: In default.

Statutes, etc., referred to:—

Government Notice No. 1227 of 1934, Rule 37.
Section *eighty* of Act No. 32 of 1944.

NOTE BY REGISTRAR.

When the Bill of Costs was reviewed the President overlooked the fact that the Stamp Duty on a Bill of Costs is 2s. *vide* Table "A" of the Native Divorce Court Rules. The Bill was evidently stamped in accordance with the Magistrates' Court Act tariff of Stamp duty.